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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAYMOND ANTHONY BROEKER, Appellant.	)	2 CA-CR 2007-0279 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070071

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Laura P. Chiasson — Tucson
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, Raymond Broeker was convicted of theft by control and third-degree burglary related to the theft of an automatic teller machine (ATM) from a Tucson business. The trial court sentenced him to presumptive, concurrent terms of 6.5 and 4.5 years' imprisonment. He contends on appeal that the court erred by denying his mid-trial request for a voluntariness hearing and by admitting other evidence at trial. We affirm.

¶2 We view the evidence in the light most favorable to upholding Broeker's convictions. *See State v. Magnum*, 214 Ariz. 65, ¶ 3, 150 P.3d 252, 253 (App. 2007). The theft in question occurred early in the morning on October 19, 2005. It was captured on surveillance video, but the video quality was too poor to permit identification of the culprits. When stolen, the machine contained approximately $2,000–$3,000; when it was found later in the day in a vacant lot, it had been forced open and emptied of cash. Broeker was arrested the same day after fleeing from a traffic stop. He had seven hundred dollars in twenty-dollar bills in his pocket and a fresh scrape on his arm. DNA obtained from a blood stain left on the ATM matched Broeker's, and footprints outside the business showed "similar class characteristics," that is, similar "tread pattern or tread design, physical size, and wear characteristic[s]," as Broeker's shoes.

¶3 In response to questioning after his arrest, Broeker told police he lived at an address on Halcyon Street and had spent the night of October 18, 2005, at a "casino with some girl." On direct examination at trial, however, Broeker testified he had spent the night of the eighteenth at home at an address on Thurber.

¶4 The prosecutor informed the trial court that he wanted to impeach Broeker with his earlier statements. Initially, Broeker objected that the statements were "not Mirandized." When the court responded that Broeker could "be impeached with statements not subject to *Miranda* as long as they're not involuntary," counsel requested a voluntariness hearing. Counsel also suggested that the impeaching statements had not been disclosed to him, but the prosecutor avowed to the court that they had, and counsel later clarified that he had received them. The court noted there was no "facial indication" the statements had been made involuntarily,[1] and it allowed the impeachment without conducting a voluntariness hearing. On cross-examination, Broeker admitted having lied to police.

¶5 Broeker argues on appeal the trial court was "required to grant the motion." We disagree. "Although a defendant is entitled to a hearing outside the presence of a jury to determine the voluntariness of his statements, he waives that right by failing to make [a] timely request for a voluntariness hearing." *State v. Wargo*, 140 Ariz. 70, 74, 680 P.2d 206, 210 (App. 1984); *see also State v. Anaya*, 170 Ariz. 436, 443, 825 P.2d 961, 968 (App. 1991) ("The defendant is responsible for properly raising issues such as voluntariness . . . ."). Generally, a motion for a voluntariness hearing must be made at least twenty days

[1]According to the transcript, the trial court stated there was "no facial indication of voluntariness," but, as the state points out in its answering brief, the context of the court's statement clearly indicates the court either stated or meant to say that there was no facial indication of *in*voluntariness. Broeker has not challenged the state's characterization of the court's intended meaning.

before trial. *See* Ariz. R. Crim. P. 16.1(b); *State v. Alvarado*, 121 Ariz. 485, 488, 591 P.2d 973, 976 (1979). But a trial court may, in its "discretion, . . . also entertain a motion for a voluntariness hearing at trial." *Alvarado*, 121 Ariz. at 488, 591 P.2d at 976.

¶6 Broeker offered no explanation for the tardiness of his request. And, he did not assert that evidence of police coercion existed. As already noted, the trial court stated there was no facial indication of involuntariness. Under these circumstances, we cannot say the court abused its discretion in denying Broeker's untimely motion.

¶7 Broeker next asserts the trial court erred by denying his motions in limine to preclude evidence of the video surveillance tape, footprint comparisons, and money found in his pocket. Broeker's motions were based on Rule 403, Ariz. R. Evid., which allows a trial court to preclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." "[U]nfair prejudice 'means an undue tendency to suggest decision on an improper basis,' . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993), *quoting* Fed. R. Evid. 403 advisory committee note. "We review a trial court's evidentiary decisions for an abuse of discretion, giving deference to its determination on relevance and unfair prejudice." *State v. Smith*, 215 Ariz. 221, ¶ 48, 159 P.3d 531, 542 (2007) (citations omitted).

¶8 Broeker argues on appeal, as he did below, that the evidence had little probative value because it did not directly link him to the crime. He contends the video surveillance tape "was almost impossible to make out"; the shoe prints found at the scene

were merely "similar" to the tread of Broeker's shoes, and "[n]umerous copies of the same shoes could be found at any store"; and "no serial numbers of the money in the [ATM had been] recorded." He concludes the evidence was "[t]hus . . . more prejudicial than probative," but he offers no support for his conclusion and does not explain how such evidence could have invited the jury to decide on an improper ground. His arguments regarding the probative value of the evidence go to the weight of the evidence, not its admissibility. *Cf. State v. Dutton*, 83 Ariz. 193, 198, 318 P.2d 667, 670 (1957) ("Uncertainty of identifying evidence goes to its weight, rather than its admissibility."). Such arguments are appropriately directed to the jury, as they were in this case. The trial court did not abuse its discretion by denying Broeker's motions in limine.

¶9 We affirm Broeker's convictions and sentences.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge